



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**Divorce Cause 39 of 2007**

**S M .....PETITIONER**

**VERSUS**

**J M .....RESPONDENT**

**R U L I N G**

The application is made by way of Originating Summons under Rule 2(1) of the matrimonial causes rules and seeks that applicant be allowed to file a petition in the Divorce Registry at Malindi for dissolution of his marriage with the respondent (J M) withstanding that 3 years have not passed since celebration of the union.

The applicant (S M) has sworn an affidavit in which he states that he met the respondent, became good friends, and asked her to marry him after promising that she would not indulge in drunkenness and/or illegal drug taking. So on 31<sup>st</sup> January 2007, they got married under the Marriage Act as supported by the marriage certificate annexed as SM1. He now wishes for that marriage to be dissolved as the respondent has been cruel to him and has no regard for him, having gone against her promise not to engage in drugs and alcohol. He now fears for his life as the respondent picks up quarrels with an aim of causing him injury, being of ungovernable temper. He has made many attempts to reconcile with her in vain and says

- (a) The respondent duped him into marrying her as she is still involved in drunkenness and drugs.
- (b) The marriage has broken down irretrievably.

He refers to incidences when respondent has gone home drunk in the company of her friends, yelling, shouting and causing a commotion; when he tried to calm her down, she begun hitting him with all manner of blunt objects within sight and reach, scratching him with her sharp nails, as her friends watched. He made a report to the police about the incident as per the OB extract annexed and marked SM2, whereupon respondent was arrested by police.

Applicant then sought treatment at Malindi GeneralHospital as per copies of treatment notes marked SM3.

These incidences of drunken violence have repeated themselves and on 12<sup>th</sup> February 2007 the applicant had to seek refuge at a neighbour's home.

When she sobered up the next day, she did not want to talk to applicant and lamented that he was a hindrance to her freedom and on 15<sup>th</sup> February 2007, she ran away from home and returned on 20<sup>th</sup> February 2007. She did not want to discuss where she had been, saying she had the freedom to go and visit her friends.

In a bid to save the marriage, applicant decided to take her to Italy, thinking that perhaps a different environment and being away from the influence of her friends would help. However while in Italy, she ran away from where they were staying in search of a bar and stole Euro 500 from the applicant. She was eventually arrested by the Italian police for being drunk and disorderly, whereupon applicant was called to the police station to explain her status in Italy.

Applicant pleaded for her release and undertook that she would not be involved in the same conduct again. The quarrels continued in Italy with respondent constantly complaining that applicant was a hindrance to her freedom and respondent became violent and injured applicant, resulting in him making a report to police as her annexure SM 4 (which is in Italian) and translated into English (SM5)

As a result they were asked to leave Italy lest they got apprehended for being a public nuisance and they returned to Kenya. After a short period, respondent ran away and applicant has not seen her to date. He therefore seeks to be allowed to end the marriage. There are no children to the said union.

The application was served on respondent who refused to acknowledge service, and the matter proceeded exparte. At the hearing, Mr. Bosire, acting for the applicant urged this court to allow the prayers pointing out that respondent has been cruel to applicant and the events of disappearance only point to the marriage never working.

Applicant reads ill motive on the respondent's part and that the parties have never had exercise of conjugal rights – which has caused applicant harm and distress.

Under section 6 of the Matrimonial Causes Act,

***“No petition for divorce shall be presented to the court unless at the date of the presentation of the parties, three years have passed since the date of the marriage...”***

However a judge may, upon an application being made allow for one to file such petition on grounds of exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent, in determining an application of this nature, the court is expected to pay due regard to the interest of any children of the marriage and whether there is reasonable probability of reconciliation between the parties before the expiry of the three years. In this instance, there are no children.

There have been incidences of violence by the respondent which are supported by reports made by appellant to the police – he has indicated suffering aggression in the hands of respondent resulting in injury as shown by the annexed documents. Respondent is not even living with him now, having walked out of the matrimonial home after declaring that applicant was a hindrance to her freedom – this demonstrates that applicant has been exposed to exceptional hardship and he is allowed to petition for the dissolution of their union before the expiry of the three years. Applicant shall bear the costs of this application.

Written and dated this 25<sup>th</sup> day of **February 2010** at Malindi.

Read on 25<sup>th</sup> March 2010.

**H. A. Omondi**  
**JUDGE**

